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**Beta Steel Corporation and Dennis Holland.** Case 25–CA–25139

August 23, 2002

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On January 18, 2002, Administrative Law Judge Jerry M. Hermele issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the Supplemental Decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Beta Steel Corporation, Portage, Indiana, its officers, agents, successors, assigns, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. August 23, 2002

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Wilma B. Liebman,	Member
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William B. Cowen,	Member
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Michael J. Bartlett,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

*Belinda J. Brown, Esq.,* for the General Counsel.  
*Terry R. Boesch, Esq. (Boesch & Istrabadi, P.C.),* Valparaiso, Indiana, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. On December 11, 1997, Judge Arthur J. Amchan issued a decision finding that the Respondent, Beta Steel Corporation (Beta), violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee Dennis Holland on September 13, 1996; a decision affirmed by the National Labor Relations Board on

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enf'd. 188 F.2d 362 (3rd Cir. 1951).

September 30, 1998, 326 NLRB 1267 (1998), and enforced by the United States Court of Appeals for the Seventh Circuit on March 14, 2000. *Beta Steel Corp. v. NLRB*, 210 F.3d 374 (7th Cir. 2000). The Respondent offered Holland reinstatement to his old job but Holland declined the offer on April 14, 2000. Thereafter, a dispute arose regarding the amount of backpay owed by Beta to Holland, causing the General Counsel to issue a "compliance specification" on July 27, 2000, in which Beta's liability was calculated at \$64,136. On August 16, 2000, Beta denied various allegations therein and offered several affirmative defenses, but the Board granted summary decision in the General Counsel's favor on two matters: that the backpay period ran from September 13, 1996, to April 14, 2000; and that the gross backpay figure was \$64,136. 334 NLRB No. 32 (June 6, 2001).

This case, to determine the appropriate amount of backpay due Holland, was tried on November 8, 2001, in Valparaiso, Indiana, during which the General Counsel presented two witnesses and the Respondent presented one witness. At trial, the General Counsel calculated the Respondent's backpay liability with interest to be \$82,502, as of November 8, 2001 (GC Exhs. 2–3; Tr. 23–24). Both parties then filed briefs on December 20, 2001.

FINDINGS OF FACT

Dennis Holland worked for Beta from 1993 until his discharge in September 1996, performing a variety of jobs in the shipping department and earning \$10 per hour in 1996 (GC Exhs. 1(a), (h); Tr. 137). His roundtrip drive between home and work was 15 miles (Tr. 45). Holland would have received two weeks of paid vacation and contributions to his "401(k)" plan from September 1996, to April 2000 (GC Exh. 1(h)). While employed at Beta, Holland only had to pay \$5 for each medical prescription drug he and his family purchased, and the Company's medical insurance premium was \$34.60 every 2 weeks. Also, there was a yearly deductible of \$600. But Beta's health insurance plan offered no coverage for eye-related problems (Tr. 17, 47–48, 51, 87).

After his September 13, 1996 discharge, Holland received unemployment benefits in Indiana, which ran for 6 months (Tr. 41–42, 154). He also withdrew the "401(k)" contributions in his account, incurring a \$684.54 tax penalty in 1997 (GC Exh. 14; Tr. 19–20). Holland also registered with the Indiana Department of Work Force Development and applied for jobs with 64 employers in northwest Indiana (GC Exhs. 15–16; Tr. 107, 177–178). Holland also continued as a volunteer fireman after his discharge from Beta (Tr. 104). In early 1997, Holland applied for a job with Plastic Line Manufacturing in Merrillville, Indiana, landing a job there as a truck driver in the spring of 1997 (GC Exh. 1(c); R. Ex. 1; Tr. 45, 92, 107). His roundtrip commute to this northwest Indiana job was 13 miles more than his commute to Beta, and he earned no vacation benefits there, nor received any medical insurance coverage. Holland kept this job until early 1998 (GC Exh. 1(c); Tr. 46, 49, 56–57, 64). During his period of unemployment and employment with Plastic Line Manufacturing, Holland's wife incurred an \$85 bill for an eye examination (GC Exh. 5), had a magnetic resonance imaging test partly costing \$300 (GC Exhs. 6–7), and had a \$135 neurological examination (GC Exh. 8). Holland and/or his family also had \$938.01 in additional medical bills through the end of 1997 (GC Exh. 1(c)).

Holland got a better paying truck driver job in early 1998 with Steel Cities Steel, of Chesterton, Indiana. His roundtrip commute to this job was 30 miles (GC Exh. 1(c); Tr. 45–46). He did receive health insurance benefits from this job but his wife incurred \$19.51 and \$10.36 prescription drug charges in late 1998 (GC Exhs. 12–13; Tr. 81). Also, while with Steel Cities Steel, Holland and/or his family had an additional \$1,389.27 in medical expenses. Further, Holland received no vacation benefits with this employer (GC Exh. 1(c)).

Holland found another better-paying truck driver job with Midwest Machining, of Griffith, Indiana, in the spring of 1999, which he currently holds. The round trip commute to this job is 30 miles. Holland receives 1 week of vacation pay from this employer (GC Exh. 1(c); Tr. 46–47).

Thomas Grzesik is a rehabilitation counselor and vocational expert in the northwest Indiana and Chicago area. He reviewed Holland's work history and education, as well as the area labor market from 1996 to 2000. Because there was a good economy during that time period in that market, there were many jobs available (Tr. 110, 120, 127–128). Grzesik contacted employers he was familiar with and examined U.S. Bureau of Labor Statistics data to prepare a list of 14 employers that Holland could have sought employment with. All of these employers paid more than the three jobs Holland found after 1996, as well as comparable benefits. All of these employers were hiring from 1996 to 2000 in northwest Indiana or suburban Chicago. All of these 14 jobs were either unskilled or semiskilled, and Holland could have learned any of the jobs within 30 days (R. Exh. 4; Tr. 131–134, 138–139, 162–163, 166, 170). According to Grzesik, Holland could have earned at least \$12 per hour from 1997 to 2000. Thus, for 1997 he could have earned about \$4,800 more; for 1998 he could have earned about \$5,200 to \$6,000 more, for 1999 he could have earned about \$2,800 more, and for the first quarter of 2000 he could have earned about \$700 more (Tr. 152, 156–157). There was no guarantee, of course, that Holland would have obtained any of these jobs had he applied for them (Tr. 164). Indeed, Holland applied at three of the 14 listed employers and was rejected at two. But one employer, Kenwal Steel Company, offered him a job which he rejected because he had just started working at Midwest Machining (Tr. 173, 175).

#### ANALYSIS

It is very well-settled that, in compliance proceedings, the General Counsel has the burden to establish the gross amount of backpay owed to the discriminatee. Then, the burden shifts to the employer, who has committed the illegal unfair labor practice, to produce evidence that would mitigate its liability. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). Here, Holland's gross backpay figure is \$64,136 for the period September 13, 1996 to April 14, 2000. The only issue is whether that amount should be reduced for various reasons advanced by the Respondent. And the most significant such reason concerns the Respondent's theory that Holland should have found higher paying jobs than the three jobs he worked at from the spring of 1997 to the end of the backpay period in April 2000. In this regard, the Respondent relies upon the testimony of its vocational expert, Thomas Grzesik, who identified 14 area employers that paid better wages than the three employers Holland wound up working for, but earning only approximately half of what he made at Beta.

A wrongfully discharged discriminatee is only required to make a reasonable, good faith effort to find other work, and his lack of success in doing so or securing only lower-paying positions does not automatically mean that a Respondent can mitigate its backpay liability. *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991); *Delta Data Systems Corp.*, 293 NLRB 736 (1989). Holland was unemployed for approximately 6 months after his discharge from Beta, but he quickly registered with the state unemployment office and applied for 64 area jobs, including Plastic Line Manufacturing, before obtaining a truck driving job with this employer in the spring of 1997. Then, he searched for and found better-paying truck driving jobs in 1998 and 1999, the latter position which he currently holds. Clearly, under these circumstances, it is concluded that Holland made a good faith search for work during the backpay period at issue and did not willfully seek lower paying work. See *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972); *Chem Fab Corp.*, 275 NLRB 21, 24 (1985). Compare *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 459 (3d Cir. 1992) (the immediate acceptance of a one-third reduction in pay without undertaking any search for suitable interim employment was not reasonably diligent). As for the possible existence of 14 better paying jobs, those jobs were just that—mere possibilities, insufficient to rebut the conclusion that Holland's search was reasonable. Moreover, Holland applied at two of those 14 employers and was rejected. See *Lundy Packing Co.*, 286 NLRB 141, 142 (1987).

Finally, although one of the 14 employers offered him a job, which he rejected, Holland was not legally required to obtain this possible higher-paying job once he had "embarked on a legitimate course of interim employment." *F.E. Hazard, Ltd.*, 303 NLRB 839 (1991). See *Flannery Motors, Inc.*, 330 NLRB 994, 996 (2000). Further, Holland had just found his third, and current, interim job at Midwest Machining when he received this offer. Also, it is unclear what salary offer Holland received from this one employer. In sum, the presiding Judge rejects the Respondent's primary theory of mitigation.

Turning to the remaining minor contentions, the Respondent denied in its answer several allegations regarding Holland's expenses, vacation benefits, medical reimbursement, and 401(k) tax liability. At trial, however, the Respondent offered no evidence on these matters, nor did it address any of these matters in its brief. So, because of its failure of proof, all of these minor matters are resolved in the General Counsel's favor. Therefore, the Respondent owes Holland \$81,726.33 through the end of 2001.<sup>1</sup>

#### ORDER

Accordingly, it is ordered<sup>2</sup> that the Respondent, Beta Steel Corporation, its officers, agents, successors, and assigns, shall pay \$81,726.33 to Dennis Holland, together with interest to be

<sup>1</sup> This figure is based on Attachment A of the General Counsel's December 21, 2001 brief. Therein, the General Counsel recalculated the medical expenses to be \$1,285, compared to \$2,877 (GC Exh. 3), because of additional evidence adduced at trial. This recalculation appears reasonable, but should be reduced by \$506.67 because the presiding Judge rejected GC Exhs 9, 10, and 11, which concerned certain medical bills.

<sup>2</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), making the appropriate deduc-

tions for any tax withholding required by State and Federal laws.

Dated: Washington, D.C. January 18, 2002